

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

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TODD SEMON, on behalf of himself, and all :  
others similarly situated, :  
 :  
Plaintiff, Civil Action :  
 : No. 5:10-cv-00143-cr  
v. :  
 :  
ROCK OF AGES CORPORATION, :  
SWENSON GRANITE COMPANY, LLC, :  
KURT M. SWENSON, JAMES L. FOX, :  
RICHARD C. KIMBALL, DONALD :  
LABONTE, LAURA A. PLUDE, PAMELA G. :  
SHEIFFER, CHARLES M. WAITE, and :  
FREDERICK E. WEBSTER, JR., :  
 :  
Defendants. :  
 :  
----- X

**THE COMMITTEE DEFENDANTS'**  
**OPPOSITION TO MOTION TO AMEND COMPLAINT**

NOW COME defendants James L. Fox, Pamela G. Sheiffer and Frederick E. Webster, Jr. (the "Committee Defendants"), by and through their attorneys, Dinse, Knapp & McAndrew, P.C., and oppose the motion to amend complaint filed by Plaintiff Todd Semon ("Semon") (Docket No. 53).

**MEMORANDUM**

Semon's motion to amend should be denied because this action is essentially identical to another action pending before this Court, Vladimir Gusinsky Revocable Trust v. Rock of Ages Corp., et al., No. 5:10-cv-00262-cr, and consolidation -- along with the filing of a consolidated amended complaint -- should occur instead of Semon's proposed amendment.

As set forth in the Committee Defendants' pending motions to consolidate and stay proceedings filed in both this action (Docket No. 54) and Gusinsky (No. 5:10-cv-00262-cr,

Docket No. 8), the two actions involve common questions of law and fact, and the efficiency of consolidation outweighs any potential confusion or prejudice. See Fed. R. Civ. P. 42(a).

Semon does not deny this. In fact, in his recently filed response to the motion to consolidate and stay, Semon asserted that "[i]f the Court determines that the Gusinsky Action satisfies the jurisdictional threshold for diversity jurisdiction, 28 U.S.C. §1332(a)(c), and thus that the Court has subject matter jurisdiction over the Gusinsky Action such that there is a second case to be consolidated with, then Plaintiff Semon (and Proposed Co-Plaintiff Meister) concur that the Gusinsky Action should be consolidated into the Semon Action." (Docket No. 58 at 1-2.)<sup>1</sup> It would be inefficient for the Court to grant Semon's motion to amend before ruling on the Committee Defendants' motions to consolidate and stay, and determining whether a consolidated amended complaint should be filed.

Semon's motion to amend should be denied for the independent reason that his proposed amended complaint (Docket No. 53-1) lacks merit and, if operative, would fail as a matter of law. "The Court acts within its discretion if it denies leave to amend a complaint which even as amended would fail under Fed. R. Civ. P. 12(b)(6)." Vt. Assembly of Home Health Agencies, Inc. v. Shalala, 18 F. Supp. 2d 355, 361 (D. Vt. 1998) (Sessions, J.).

As set forth in the Committee Defendants' motion to consolidate and stay (Docket No. 54 at 4), Semon's proposed amended complaint shares nearly identical allegations with the Gusinsky amended complaint, and also seeks the same relief. On December 6, 2010, the Committee Defendants filed a motion to dismiss the Gusinsky amended complaint (No. 5:10-cv-

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<sup>1</sup> The Gusinsky Plaintiff likewise agrees that consolidation is proper. See Motion Of The Vladimir Gusinsky Revocable Trust To Be Appointed Lead Plaintiff In The Consolidated Action, And For Approval Of Its Selection Of Rigrudsky & Long, P.A. As Lead Counsel And Potter Stewart, Jr. Law Offices P.C. As Liaison Counsel In The Consolidated Action. (No. 5:10-cv-00262-cr, Docket No. 25 at 1 n.1 ("Plaintiff does not object to the Motion to Consolidate.").)

00262-cr, Docket No. 35); Semon's proposed amended complaint shares the same deficiencies and fails to state a claim. Accordingly, Semon's amendment would be futile and his motion to amend should be denied. See, e.g., Vt. Assembly of Home Health Agencies, 18 F. Supp. 2d at 372 (denying motion to amend complaint to add, inter alia, "allegations supporting a class action," because amended complaint failed to state a claim); Gearren v. McGraw-Hill Cos., 690 F. Supp. 2d 254, 270-71 (S.D.N.Y. 2010) (denying putative class of shareholders' motion to amend breach of fiduciary duty claims, because such amendment would be futile) (citing McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200-02 (2d Cir. 2007)).

### **CONCLUSION**

For the foregoing reasons, Semon's motion to amend should be denied.

Dated: December 9, 2010  
Burlington, Vermont

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that the following counsel of record will be served by the ECF system:

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